Abdul Rashid Abdul Majid v Island Golf Properties Sdn Bhd

HIGH COURT (PENANG) - CIVIL SUIT 22-127-88
WAN ADNAN J
18 MAY 1989

Contract - Offer - Acceptance - Public policy - Application for membership of club - Application containing declaration by member - Whether application an offer - Whether offer was made by club after considering application - Whether declaration was part of contract - Club rule making board of club the sole authority for interpretation of the club rules - Whether contrary to public policy

Societies - Club - Application for membership of club - Offer - Acceptance - Application containing declaration by member - Whether application an offer - Whether offer was made by club after considering application - Whether declaration was part of contract - Club rule making board of club the sole authority for interpretation of the club rules - Whether contrary to public policy

The defendants owned, managed and operated a social golf club. Rule 3 of the club's rules provided, inter alia, that the club was a proprietory club, of which the defendants were the proprietors with a board of directors responsible for the policies, management and operation of the club. Rule 5 of the rules provided, inter alia, that a member shall not, by reason of his membership, be under any financial liability except for payment of his annual subscription and any other sums due under or levied under the rules and bye-laws to the defendants. The plaintiff applied to become a member of the club by submitting the necessary application form and duly executed a declaration contained therein which stated, inter alia, that he accepted and agreed that the board of the defendants had sole responsibility for the policies, management and operation of the club with the power to increase entrance fees and subscriptions and to levy any additional charges to meet expenditure and it also has the sole right to amend, vary, add to or formulate such rules, terms and conditions of the club, including the withdrawal or addition of benefits and privileges of members as it may in its absolute discretion deem necessary. A preliminary issue under O 33 r 2 of the Rules of the High Court was presented to the court. The issue was whether the board was entitled to levy and collect fees known as development fees from members. The board sought to levy and collect the development fees pursuant to its powers under the rules. Rule 33 of the club's rules provided, inter alia, that the board shall be the sole authority for the interpretation of the rules and the bye-laws made thereunder and that the decision of the board shall be final and binding on all members.

Held, declaring that the defendants' board was not entitled to levy and collect the fees:

(1) The plaintiff's application for membership was merely a preliminary step. The offer for membership came from the defendants after they had considered the plaintiff's application. The contract between the plaintiff and the defendants was formed only when the plaintiff accepted the offer by making the payment of the entrance fee and the first subscription. Therefore the declaration in the application form was not part of the contract. It was just an antecedent communication. The only contract between the plaintiff and the defendants was the rules of the club.

(2) The authority to levy fees must clearly be given by the rules of the club and there was no such authority under the rules.

(3) Rule 33 clearly made the board the sole authority for the interpretation of the rules and as it purported to oust the courts from their jurisdiction the rule was contrary to public policy and therefore void.

[*Editorial Note*: The defendants have appealed to the Supreme Court vide Civil Appeal No 02-203-1989.]

Cases referred to

1 *Bomanji Ardeshir Wadia & Ors* v *Secretary of State* AIR (1929) PC 34 (folld)
2 *Baker* v *Jones and Ors* [1954] 2 All ER 553 (refd)
3 *Lee* v *Showmen's Guild of Great Britain* [1952] 1 All ER 1175 (refd)

Legislation referred to

Rules of the High Court 1980 O 33 r 2

R Maneksha for the plaintiff.
DP Naban for the defendants.

Cur Adv Vult

Wan Adnan J: This is the hearing of a preliminary issue under O 33 r 2. The preliminary issue is as follows:

> Whether the board are entitled to levy and collect fees known as development fees, more fully described in the affidavit of Khoo Beng Jong affirmed on 18 November 1988 and filed herein.

The defendants, a private limited company, own, manage and operate a social golf club in Penang known as 'Bukit Jambul Country Club' ('the club'). Membership of the club is of the following types: honorary membership; ordinary membership; ordinary transferable membership; subscribing membership; institutional corporate membership; expatriate transferable membership; ordinary social membership; term membership; visiting membership. The plaintiff is an ordinary transferable member.

The rules of the club are contained in the 'Bukit Jambul Country Club, Rules Relating to the Club and Membership' ('the rules'). Rule 3 reads as follows:

> (i) The club is a proprietary club, the proprietor of which is Island Golf Properties Sdn Bhd, a limited company (hereinafter referred to as 'the company') with a board of directors (hereinafter referred to as 'the board') entrusted with the policies, management and operation of the club.
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> (ii) The company will provide the club with the use of a golf course, which it leases from the Penang Development Corporation under a 60 year lease, commencing from ... and what the board may from time to time deem necessary for carrying on the club in accordance with the objects and these rules and bye-laws and will be solely responsible for all the engagement and payment of servants and for catering and for all other matters involving expenditure of money.

The rights and liabilities of members are mentioned in r 5 which states as follows:

> Every member of the club shall, subject to these rules and the bye-laws for the time being in force, be entitled to use and enjoy in common with other members or nominees of the club

the golf course and clubhouse and the things therein provided by the company for the use of the club, but he shall not by reason of his membership, be under any financial liability except for payment of his annual subscription and any other sums due under or levied under these rules and bye-laws to the company and he shall not by reason of his membership have any proprietary rights over the club, its monies or its properties and assets. The accounts of the club, distributed to the members and nominees at each annual general meeting shall be for information only and its approval shall be solely a matter for the company.

The plaintiff like any other persons submitted the necessary application form and duly executed a declaration contained therein which reads, inter alia, as follows:

In making my application I declare that I am aware and have full knowledge that Bukit Jambul Country Club is a proprietary club (and not a members club), owned and managed by the Island Golf Properties Sdn Bhd who have the right to use the golf course as a club by a lease given to them by the Penang Development Corporation. I also accept and agree that the board of Island Golf Properties Sdn Bhd has sole responsibility for the policies, management and operation of Bukit Jambul Country Club with the power to increase entrance fees, and subscriptions, and to levy any additional charges to meet expenditure and it also has the sole right to amend, vary, add to or formulate such rules, terms and conditions of the club, including the withdrawal or addition of benefits and privileges of members as it may in its absolute discretion deem necessary.

The following rules which are relevant to this proceeding are set out in full as follows:

Rule 24 Entrance Fees

The entrance fees and any other fees payable by the various categories of members to the club shall be determined by the Board from to time. The board may at its discretion waive, increase or decrease the entrance fees for any application for any category of membership as it thinks fit.

Rule 25 Monthly Subscriptions

All members shall pay monthly subscriptions *and any other charges* to the club. The monthly subscriptions *and any other charges* payable by the various categories of members to the club shall be determined by the board, and shall be paid in advance.
(Note: the words in italics were added in by the board on 24 April 1988)

Rule 31 Powers of the Board

(i) The board will have powers to deal with policy matters, capital expenditure, income, expansion and development of the club facilities, as well as the power to decide on all questions relating to the management of the club and all questions arising out of or not covered by any rules or bye-laws. Its decision on all matters shall be final.

Rule 32 Powers to make, amend, add to or repeal these rules

(ii) The board shall have full power to make, amend, add to or repeal these rules and bye-laws and to decide all questions relating to the management of the club and all questions arising out of or not covered by any of these rules or bye-laws.

Rule 33 - Interpretation of rules

The board shall be the sole authority for the interpretation of these rules and the bye-laws made hereunder and the decision of the board thereon shall be final and binding on all members and nominees of any class.

In the exercise of their powers under the rules, the board levied a fee known as the development fee payable by the members as follows:

(a) for members who had applied for membership prior to 3 April 1988:
   (i) golfing members $1500
   (ii) non-golfing members $1250

(b) for members who had applied for membership after 3 April 1988
   (i) golfing members $2000
   (ii) non-golfing members $1750

First, what is a proprietary club? According to *The Law of Clubs* by JF Josling and Lionel Alexander at p 10:

A proprietary club is in essence a business in which an individual or a partnership of individuals, or a company, provides the facilities and amenities of a club for the use of persons who are in reality customers, but who generally pass under the description of members. These members will have no interest in the club property or income; they stand in a contractual relationship, not with each other, but with the proprietor, the incidents of the contract being construed out of the rules which he lays down for them to observe.

Counsel for the plaintiff says that the plaintiff in submitting the application form was just making an offer to become a member. The application form which contained the declaration was merely a preliminary communication before the contract was entered. As between the plaintiff and the defendants the rules of the club is the contract. The application form together with other documents attached thereto are not part of the rules and should not be considered as part of the contract.

The following paragraph from *The Law of Clubs* at p 34 was brought to my attention:

A member's entrance fee and his first subscription become payable when he is notified of his election. There is at that stage no contract on the part of the member to pay the entrance fee, nor, for that matter, to become a member. Hawkins J in *Re Duty on the Estate of the New University Club* (1887) 18 QBD 720, considered the nature of members' subscriptions and entry fees to a members' club. It may be deduced from his Lordship's conclusions that the application for membership is simply a preliminary step. The offer is the election, and the proposed member has an option to accept or refuse it. The acceptance which completes the contract is the payment of the entry fee and first subscription in accordance with the offer.

I was also referred to the decision of the Privy Council in the case of *Bomanji Ardeshir Wadia & Ors* v *Secretary of State*[1] wherein it was said:

> Nothing is better settled than that when parties have entered into a formal contract that contract must be construed according to its own terms and not be explained or interpreted by the antecedent communings which led up to it.

I agree with the above principles of law. In my view the plaintiff's application for membership was merely a preliminary step. The offer for membership came from the defendants after the defendants had considered the plaintiff's application. The contract between the plaintiff and the defendants was formed only when the plaintiff accepted the offer by making the payment of the entrance fee and the first subscription. It is therefore my view that the declaration in the application form is not part of the contract. It was just an antecedent communication. The only contract between the plaintiff and the defendants is the rules of the club.

The liability of a member in r 5 is that 'he shall not by reason of his membership be under any financial liability except for payment of his annual subscription and *any other sums due under or levied under these rules* and bye-laws to the company.' (Emphasis is added). It is clear from the rule that a member shall be liable to pay 'any other sums' only if they are due or can be levied under the rules.

Counsel for the defendants says that authority to levy the development fee comes from r 24. According to him under this rule the defendants can levy any fee they like and the members will have to pay. In my view r 24 does not give that general authority. On its proper construction the rule only gives the authority to levy and determine the entrance fees. As regards 'any other fees payable' the rule only gives the authority to determine the amount if such fees can be levied. The authority to levy is not given by that rule. Rule 24 cannot be given the construction that will allow the defendants to levy any fee they like. The defendant is a proprietary club. The authority to levy fees must clearly be given by the rules of the club. I also do not find the authority to levy under the amended r 25 or any other rule.

I now come to the provisions of r 33. Counsel for the plaintiff says that the rule is ineffective as it ousts the courts from their jurisdiction. In *Baker* v *Jones & Ors*[2] Lynskey J said:

> That contract is contained in, or to be implied from, the rules. The courts must consider such a contract as they would consider any other contract. Although parties to a contract may in general, make any contract they like, there are certain limitations imposed by public policy and one of those limitations may be that parties cannot, by contract, oust the ordinary courts from their jurisdiction.

The learned judge then quoted Denning LJ in *Lee* v *Showmen's Guild of Great Britain*:[3]

> If parties should seek, by agreement, to take the law out of the hands of the courts and into the hands of a private tribunal, without any recourse at all to the courts in case of error of law, then the agreement is to that extent contrary to public policy and void.

The learned judge went on to say:

> The interpretation of the rules is a question of law which the courts will examine.

Rule 33 clearly makes the board the sole authority for the interpretation of the rules. I hold that this is contrary to public policy and therefore void. For the above reasons my answer on the preliminary issue is in the negative. The board is not entitled to levy and collect the development fee. The determination of the issue disposes of the whole matter between the parties. I therefore give judgment for the plaintiff and make the following orders:

(1) A declaration that the rules of the club do not allow for the levying of the development fee.

(2) That all fees collected as development fees be repaid to the plaintiff.

(3) An injunction be granted to restrain the defendants whether by themselves or by their servants or agents or servants or agents of the club or otherwise however from enforcing or collecting the said development fee or interfering with the plaintiff in his use and enjoyment of the benefits of membership of the club.

(4) Costs to be paid by the defendants.

Order accordingly.

Solicitors: *Ong & Manecksha; Skrine & Co.*

Reported by *PS Ranjan*